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REGULATORY REFORM AND RELIEF ACT

FEBRUARY 23, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. HYDE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 926]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 926) to promote regulatory flexibility and enhance public participation in Federal agency rulemaking and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Reform and Relief Act".

TITLE I—STRENGTHENING REGULATORY FLEXIBILITY

SEC. 101. JUDICIAL REVIEW.

(a) AMENDMENT.—Section 611 of title 5, United States Code, is amended to read as follows:

"§ 611. Judicial review

"(a)(1) Except as provided in paragraph (2), not later than 180 days after the effective date of a final rule with respect to which an agency—

"(A) certified, pursuant to section 605(b), that such rule would not have a significant economic impact on a substantial number of small entities; or

"(B) prepared a final regulatory flexibility analysis pursuant to section 604, an affected small entity may petition for the judicial review of such certification or analysis in accordance with the terms of this subsection. A court having jurisdiction to review such rule for compliance with the provisions of section 553 or under any other provision of law shall have jurisdiction to review such certification or analysis.

"(2)(A) Except as provided in subparagraph (B), in the case where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 180 day period provided in paragraph (1), such lesser period shall apply to a petition for the judicial review under this subsection.

"(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b), a petition for judicial review under this subsection shall be filed not later than—

"(i) 180 days; or

"(ii) in the case where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 180-day period provided in paragraph (1), the number of days specified in such provision of law,

after the date the analysis is made available to the public.

"(3) For purposes of this subsection, the term 'affected small entity' means a small entity that is or will be adversely affected by the final rule.

"(4) Nothing in this subsection shall be construed to affect the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law.

"(5)(A) In the case where the agency certified that such rule would not have a significant economic impact on a substantial number of small entities, the court may order the agency to prepare a final regulatory flexibility analysis pursuant to section 604 if the court determines, on the basis of the rulemaking record, that the certification was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(B) In the case where the agency prepared a final regulatory flexibility analysis, the court may order the agency to take corrective action consistent with the requirements of section 604 if the court determines, on the basis of the rulemaking record, that the final regulatory flexibility analysis was prepared by the agency without observance of procedure required by section 604.

"(6) If, by the end of the 90-day period beginning on the date of the order of the court pursuant to paragraph (5) (or such longer period as the court may provide), the agency fails, as appropriate—

"(A) to prepare the analysis required by section 604; or

"(B) to take corrective action consistent with the requirements of section 604, the court may stay the rule or grant such other relief as it deems appropriate.

"(7) In making any determination or granting any relief authorized by this subsection, the court shall take due account of the rule of prejudicial error.

"(b) In an action for the judicial review of a rule, any regulatory flexibility analysis for such rule (including an analysis prepared or corrected pursuant to subsection (a)(5)) shall constitute part of the whole record of agency action in connection with such review.

"(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply only to final agency rules issued after the date of enactment of this Act.

SEC. 102. RULES COMMENTED ON BY SBA CHIEF COUNSEL FOR ADVOCACY.

(a) IN GENERAL.—Section 612 of title 5, United States Code, is amended by adding at the end the following new subsection:

"(d) ACTION BY THE SBA CHIEF COUNSEL FOR ADVOCACY.—

"(1) TRANSMITTAL OF PROPOSED RULES AND INITIAL REGULATORY FLEXIBILITY ANALYSIS TO SBA CHIEF COUNSEL FOR ADVOCACY.—On or before the 30th day preceding the date of publication by an agency of general notice of proposed rulemaking for a rule, the agency shall transmit to the Chief Counsel for Advocacy of the Small Business Administration—

"(A) a copy of the proposed rule; and

"(B)(i) a copy of the initial regulatory flexibility analysis for the rule if required under section 603; or

"(ii) a determination by the agency that an initial regulatory flexibility analysis is not required for the proposed rule under section 603 and an explanation for the determination.

"(2) STATEMENT OF EFFECT.—On or before the 15th day following receipt of a proposed rule and initial regulatory flexibility analysis from an agency under paragraph (1), the Chief Counsel for Advocacy may transmit to the agency a written statement of the effect of the proposed rule on small entities.

"(3) RESPONSE.—If the Chief Counsel for Advocacy transmits to an agency a statement of effect on a proposed rule in accordance with paragraph (2), the agency shall publish the statement, together with the response of the agency to the statement, in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule.

"(4) SPECIAL RULE.—Any proposed rules issued by an appropriate Federal banking agency (as that term is defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), the National Credit Union Administration, or the Office of Federal Housing Enterprise Oversight, in connection with the implementation of monetary policy or to ensure the safety and soundness of federally insured depository institutions, any affiliate of such an institution, credit unions, or government sponsored housing enterprises or to protect the Federal deposit insurance funds shall not be subject to the requirements of this subsection.".

(b) CONFORMING AMENDMENT.—Section 603(a) of title 5, United States Code, is amended by inserting "in accordance with section 612(d)" before the period at the end of the last sentence.

SEC. 103. SENSE OF CONGRESS REGARDING SBA CHIEF COUNSEL FOR ADVOCACY.

It is the sense of Congress that the Chief Counsel for Advocacy of the Small Business Administration should be permitted to appear as amicus curiae in any action or case brought in a court of the United States for the purpose of reviewing a rule.

TITLE II—REGULATORY IMPACT ANALYSES

SEC. 201. DEFINITIONS.

Section 551 of title 5, United States Code, is amended by striking "and" at the end of paragraph (13), by striking the period at the end of paragraph (14) and inserting a semicolon, and by adding at the end the following:

"(15) 'major rule' means any rule subject to section 553(c) that is likely to result in—

"(A) an annual effect on the economy of $50,000,000 or more;

"(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or

"(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; and

"(16) 'Director' means the Director of the Office of Management and Budget."

SEC. 202. RULEMAKING NOTICES FOR MAJOR RULES.

Section 553 of title 5, United States Code, is amended by adding at the end the following:

"(f)(1) Each agency shall for a proposed major rule publish in the Federal Register, at least 90 days before the date of publication of the general notice required under subsection (b), a notice of intent to engage in rulemaking.

"(2) A notice under paragraph (1) for a proposed major rule shall include, to the extent possible, the information required to be included in a regulatory impact analysis for the rule under subsection (i)(4)(B) and (D).

"(3) For a major rule proposed by an agency, the head of the agency shall include in a general notice under subsection (b), a preliminary regulatory impact analysis for the rule prepared in accordance with subsection (i).

"(4) For a final major rule, the agency shall include with the statement of basis and purpose—

"(A) a final regulatory impact analysis of the rule in accordance with subsection (i); and

"(B) a clear delineation of all changes in the information included in the final regulatory impact analysis under subsection (i) from any such information that was included in the notice for the rule under subsection (b).".

SEC. 203. HEARING REQUIREMENT FOR PROPOSED RULES; AND EXTENSION OF COMMENT PERIOD.

(a) HEARING REQUIREMENT.—Section 553 of title 5, United States Code, as amended by section 202, is further amended by adding after subsection (f) the following:

"(g) If more than 100 interested persons acting individually submit requests for a hearing to an agency regarding any rule proposed by the agency, the agency shall hold such a hearing on the proposed rule.".

(b) EXTENSION OF COMMENT PERIOD.—Section 553 of title 5, United States Code, as amended by subsection (a), is further amended by adding after subsection (g) the following:

"(h) If during the 90-day period beginning on the date of publication of a notice under subsection (f) for a proposed major rule, or if during the period beginning on the date of publication or service of notice required by subsection (b) for a proposed rule, more than 100 persons individually contact the agency to request an extension of the period for making submissions under subsection (c) pursuant to the notice, the agency—

"(1) shall provide an additional 30-day period for making those submissions; and

"(2) may not adopt the rule until after the additional period.".

(c) RESPONSE TO COMMENTS.—Section 553(c) of title 5, United States Code, is amended—

(1) by inserting "(1)" after "(c)"; and

(2) by adding at the end the following:

"(2) Each agency shall publish in the Federal Register, with each rule published under section 552(a)(1)(D), responses to the substance of the comments received by the agency regarding the rule.".

SEC. 204. REGULATORY IMPACT ANALYSIS.

Section 553 of title 5, United States Code, as amended by section 203, is amended by adding after subsection (h) the following:

"(i)(1) Each agency shall, in connection with every major rule, prepare, and, to the extent permitted by law, consider, a regulatory impact analysis. Such analysis may be combined with any regulatory flexibility analysis performed under sections 603 and 604.

"(2) Each agency shall initially determine whether a rule it intends to propose or issue is a major rule. The Director shall have authority to order a rule to be treated as a major rule and to require any set of related rules to be considered together as a major rule.

"(3) Except as provided in subsection (j), agencies shall prepare—

"(A) a preliminary regulatory impact analysis, which shall be transmitted, along with a notice of proposed rulemaking, to the Director at least 60 days prior to the publication of notice of proposed rulemaking, and

"(B) a final regulatory impact analysis, which shall be transmitted along with the final rule at least 30 days prior to the publication of a major rule.

"(4) Each preliminary and final regulatory impact analysis shall contain the following information:

"(A) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms and the identification of those likely to receive the benefits.

"(B) An explanation of the necessity, legal authority, and reasonableness of the rule and a description of the condition that the rule is to address.

"(C) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs.

"(D) An analysis of alternative approaches, including market based mechanisms, that could substantially achieve the same regulatory goal at a lower cost and an explanation of the reasons why such alternative approaches were not adopted, together with a demonstration that the rule provides for the least costly approach.

"(E) A statement that the rule does not conflict with, or duplicate, any other rule or a statement of the reasons why such a conflict or duplication exists.

"(F) A statement of whether the rule will require on-site inspections or whether persons will be required by the rule to maintain any records which will be subject to inspection.

"(G) An estimate of the costs to the agency for implementation and enforcement of the rule and of whether the agency can be reasonably expected to implement the rule with the current level of appropriations.

"(5)(A) the Director is authorized to review and prepare comments on any preliminary or final regulatory impact analysis, notice of proposed rulemaking, or final rule based on the requirements of this subsection.

"(B) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary impact analysis or notice of proposed rulemaking and shall refrain from publishing its preliminary regulatory impact analysis or notice of proposed rulemaking until such review is concluded. The Director's review may not take longer than 90 days after the date of the request of the Director.

"(6)(A) An agency may not adopt a major rule unless the final regulatory impact analysis for the rule is approved or commented upon in writing by the Director or by an individual designated by the Director for that purpose.

"(B) Upon receiving notice that the Director intends to comment in writing with respect to any final regulatory impact analysis or final rule, the agency shall refrain from publishing its final regulatory impact analysis or final rule until the agency has responded to the Director's comments and incorporated those comments in the agency's response in the rulemaking file. If the Director fails to make such comments in writing with respect to any final regulatory impact analysis or final rule within 90 days of the date the Director gives such notice, the agency may publish such final regulatory impact analysis or final rule.

"(7) Notwithstanding section 551(16), for purposes of this subsection with regard to any rule proposed or issued by an appropriate Federal banking agency (as that term is defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), the National Credit Union Administration, or the Office of Federal Housing Enterprise Oversight, the term 'Director' means the head of such agency, Administration, or Office.".

SEC. 205. STANDARD OF CLARITY.

Section 553 of title 5, United States Code, as amended in section 204, is amended by adding after subsection (i) the following:

"(j) To the extent practicable, the head of an agency shall seek to ensure that any proposed major rule or regulatory impact analysis of such a rule is written in a reasonably simple and understandable manner and provides adequate notice of the content of the rule to affected persons.".

SEC. 206. EXEMPTIONS.

Section 553 of title 5, United States Code, as amended by section 205, is further amended by adding after subsection (j) the following:

"(k)(1) The provisions of this section regarding major rules shall not apply to—

"(A) any regulation that responds to an emergency situation if such regulation is reported to the Director as soon as is practicable;

"(B) any regulation for which consideration under the procedures of this section would conflict with deadlines imposed by statute or by judicial order; and

"(C) any regulation proposed or issued in connection with the implementation of monetary policy or to ensure the safety and soundness of federally insured depository institutions, any affiliate of such institution, credit unions, or government sponsored housing enterprises regulated by the Office of Federal Housing Enterprise Oversight.

A regulation described in subparagraph (B) shall be reported to the Director with a brief explanation of the conflict and the agency, in consultation with the Director, shall, to the extent permitted by statutory or judicial deadlines, adhere to the process of this section.

"(2) The Director may in accordance with the purposes of this section exempt any class or category of regulations from any or all requirements of this section.".

SEC. 207. REPORT.

The Director of the Office of Management and Budget shall submit a report to the Congress no later than 24 months after the date of the enactment of this Act containing an analysis of rulemaking procedures of Federal agencies and an analysis of the impact of those rulemaking procedures on the regulated public and regulatory process.

TITLE III—PROTECTIONS

SEC. 301. PRESIDENTIAL ACTION.

Pursuant to the authority of section 7301 of title 5, United States Code, the President shall, within 180 days of the date of the enactment of this title, prescribe regulations for employees of the executive branch to ensure that Federal laws and regu-

lations shall be administered consistent with the principle that any person shall, in connection with the enforcement of such laws and regulations—

(1) be protected from abuse, reprisal, or retaliation, and

(2) be treated fairly, equitably, and with due regard for such person's rights under the Constitution.

PURPOSE AND SUMMARY

H.R. 926, the "Regulatory Reform and Relief Act" is designed to improve the federal regulatory system by: (1) strengthening the Regulatory Flexibility Act of 1980,[1] (2) amending the Administrative Procedure Act[2] to require the preparation of regulatory impact analyses whenever a "major rule" is promulgated by a federal agency, and (3) directing the President to prescribe regulations for the executive branch aimed at protecting citizens from abuse and retaliation in their dealings with the regulatory system.

Title I of the bill strengthens the Regulatory Flexibility Act of 1980 which was designed to relieve the regulatory burden on small entities by requiring agencies when promulgating rules to consider their impact on such small entities and, where possible, to mitigate the effect of such rules. First, H.R. 926 grants to affected small entities judicial review to determine whether rules have been adopted in compliance with RFA. Secondly, it requires agencies to circulate proposed rules to the Chief Counsel for Advocacy of the Small Business Administration (SBA) at least 30 days prior to their publication so as to permit him an opportunity to comment upon the effect they would have on small entities. Finally, the bill states as the sense of the Congress that the Chief Counsel for Advocacy of the SBA should be authorized to file briefs as an amicus curiae in actions before any federal court.

Title II of the bill is intended to provide the public greater opportunity to participate in the agency rulemaking process. This provision requires agencies to give advance notice to the public of impending rulemaking activity, and creates new procedures by which citizens may affect agency determinations to hold a public hearing or extend a public comment period. Most significantly, title II requires agencies to complete and publish a regulatory impact analysis with regard to all major rules and provides authority to the director of the Office of Management and Budget (OMB) to enforce agency compliance with such analysis requirements. The impact analysis criteria require agencies to undertake a cost and benefit analysis of every major rulemaking and explain why the method chosen by an agency to implement a law is the least costly. Provisions created by this legislation will be subject to judicial review under the same standard as are the provisions of the Administrative Procedure Act, which this title amends.

Title III of the bill responds to the problem of abuse and retaliation by government regulators. It directs the President, within 180 days of enactment, to prescribe regulations for employees of the executive branch to protect persons against abuse, reprisal, or retaliation in connection with the enforcement of Federal laws and regulations. Such regulations must also insure that persons are treated

[1] 5 U.S.C. 601–12.
[2] 5 U.S.C. 551 et seq.

fairly, equitably, and with due regard for their Constitutional rights.

BACKGROUND AND NEED FOR THE LEGISLATION

On January 9, 1995, H.R. 9 was introduced by Representatives Archer, DeLay, Saxton, Smith of Washington, and Tauzin, for themselves and 111 co-sponsors. The bill, entitled the "Job Creation and Wage Enhancement Act of 1995", contained several provisions aimed at improving the climate for business and production, as well as attempting to improve the Federal regulatory system for all citizens.[3] Divided into twelve titles, the bill was referred for consideration to several committees of the House, with the Judiciary Committee receiving primary reference to titles VI, VII, VIII, and IX. The first three of these titles, relating to improvement of the Federal regulatory system, were the subject of hearings in the Subcommittee on Commercial and Administrative Law,[4] while title IX, concerning private property rights protections and compensation, was the subject of a hearing by the Subcommittee on the Constitution.[5]

Subsequent to hearings by the Subcommittee on Commercial and Administrative Law, H.R. 926 was introduced on February 14, 1995 by Mr. Gekas, together with Mr. Hyde. The bill contained the substance of titles VI, VII, and VIII of H.R. 9 as revised and improved, taking into consideration comments offered by witnesses at the hearings and suggestions proposed by other Members. Title I of H.R. 926 is based upon Title VI of H.R. 9, while titles II and III of the former are based respectively on titles VII and VIII of the latter.

On February 16, 1995, the Judiciary Committee reported H.R. 926 to the House by a voice vote, after having adopted several amendments.

TITLE I

The Regulatory Flexibility Act was signed into law by President Jimmy Carter on September 19, 1980 and became effective on January 1, 1981.[6] The Act sought to ensure that agencies "fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation."[7] It encouraged agencies to use innovative administrative procedures in dealing with individuals, as well as small businesses, small organizations, and small governmental bodies that might otherwise be unnecessarily adversely affected by Federal regulations.

The Act was based on the conclusion that while the cost of regulatory compliance is essentially constant among entities, the size of

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[3] The purpose stated at the outset of H.R. 9 is: To create jobs, enhance wages, strengthen property rights, maintain certain economic liberties, decentralize and reduce the power of the Federal Government with respect to the States, localities, and citizens of the United States, and to increase the accountability of Federal officials.

[4] The subcommittee's hearings were held February 3 and 6, 1995.

[5] The subcommittee held one hearing on February 10, 1995.

[6] Public Law 96–354. The legislation was passed by the Senate on August 6, 1980 and by the House of Representatives on September 9, 1980. House consideration is reported at 126 Cong. Rec. 24823 (1980).

[7] Footnote to 5 U.S.C. 601, Findings and Declarations of Purpose.

an entity is relevant to its compliance potential. In business, for example, there would appear to be an obvious difference in the respective abilities of smaller and larger companies to spread the cost of complying with a regulation because of their varying volumes of sales or production. Given a company with sales of $1 million and another with $10 million, the smaller may be crucially affected in its ability to set competitive prices or perhaps even to make a profit while the larger would be less affected because of its sheer size.[8] The Act intends that agencies take this difference into account rather than merely concluding reflexively in drafting rules that "one size fits all".

The Regulatory Flexibility Act applies to every federal rule for which notice is required by Section 553(b) of the Administrative Procedure Act or other laws.[9] The Act requires an agency to prepare one or more of three documents:

A certification that a proposed rule will not have a significant impact on a substantial number of small entities, or

An initial regulatory flexibility analysis, and subsequently

A final regulatory flexibility analysis.

Pursuant to Section 605(b) of the Act, the certification is to be made by the head of the agency and published in the Federal Register at the time of general notice of proposed rulemaking for the rule or at the time of final publication of the rule. It is to be accompanied by "a succinct statement explaining the reasons for such certification."[10] Debate during floor consideration indicated that this explanation should be more than a mere statement that a rule will not have a significant impact on a substantial number of small entities. It must explain the decision to certify and discuss why it draws that conclusion, and any doubt as to whether an impact analysis should be filed, must be resolved in favor of performing the analysis.[11]

If an agency anticipates that a proposed rule will have a significant impact on a substantial number of small entities, it must prepare an initial regulatory flexibility analysis and publish it in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule. This initial regulatory flexibility analysis is supposed to include:

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[8] During hearings before the Senate prior to the enactment of the Regulatory Flexibility Act of 1990, Dr. Milton Kafoglis, a member of President Carter's Council on Wage and Price Stability, described the economic argument for regulatory flexibility for small entities:

There seem to be clear economies of scale imposed by most regulatory endeavors. Uniform application of regulatory requirements thus seems to increase the size firm that can effectively compete. The cost curve of the firm is shifted upward and to the right with its minimum point (or the elbow in an L-shaped cost curve) occurring at a larger output. If one employs the economists' theoretical "dominant firm" model and introduces such upward shifts in cost curves (the small firms'), the share of the dominant firm will increase while that of small firms will decrease. As a result industrial concentration will have increased. This hypothesis has not been questioned and is consistent with most of the case analyses that have been completed. It suggests that the "small business" problem goes beyond sympathy for the small businessman, but strikes at the heart of the established national policy of maintaining competition and mitigating monopoly. S. Rep. No. 878, 96th Cong., accompanying S. 299, p. 3–4.

[9] This exempts such things as interpretive rules, which are those intended only to implement a statute and in which Congress has not delegated legislative-type authority to the agency. One theory behind the exemption of interpretive rules from "notice and comment" rulemaking is that an agency is merely following the specifics of legislation and has little or no discretion to change the rules.

[10] 5 U.S.C. 605(b).

[11] 126 Cong. Rec. H8468 (daily ed. Sept. 9, 1980) (statement of Representative Andy Ireland).

A description of the reasons why the agency is considering such action;

A succinct statement of the objective of and legal basis for the proposed rule;

A description of the reporting, recordkeeping and other compliance requirements of the proposed rule;

An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and

A description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact on small entities.[12]

When an agency promulgates its final rule, it must either prepare a final regulatory flexibility analysis or certify that its rule will not have a significant impact on a substantial number of small entities. The final regulatory flexibility analysis must discuss comments received from the regulated community and others as well as the alternatives considered by the agency while drafting the final rule.[13]

The RFA gives the Chief Counsel for Advocacy of the Small Business Administration the responsibility of monitoring compliance with the Act and requires him to report annually on this to the President and the Congress.[14] It gives him the authority to appear as amicus curiae in any action brought in a court of the United States to review a rule in order to present his views with respect to the effect of the rule on small entities.[15]

Despite the specific requirements that are placed on agencies by the Act, there has been concern that agencies are circumventing its spirit by taking advantage of 5 U.S.C. 611, which exempts "any determination by an agency concerning the applicability of any of the provisions" of the Act from judicial review. Section 611 does authorize a regulatory flexibility analysis to be made part of the record on review of the ultimate reasonableness of a rule. A court could determine that a defective regulatory flexibility analysis led an agency to underestimate the effect of a rule on small entities and this might be of such a magnitude as to undermine the rule's rationality.[16] But this may be of little practical significance to the successful functioning of the RFA. As the former Acting Chief Counsel for Advocacy of the SBA, Doris S. Freeman noted:

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[12] 5 U.S.C. 603.
[13] 5 U.S.C. 604.
[14] 5 U.S.C. 612.
[15] Id. The Chief Counsel for Advocacy has only infrequently attempted to appear as amicus under this section. In the case of *Lehigh Valley Farmers* v. *Block* 640 F. Supp. 1497, aff'd 829 F.2d 409 (1987), there was debate between the Office for Advocacy and the Department of Justice over the constitutionality of the former's appearance as amicus and the Chief Counsel withdrew his brief. In September of 1994, the Chief Counsel filed notice of intent to file an amicus brief in *Time Warner Entertainment Limited Partnership* v. *Federal Communications Commission*, No. 93–1723 (D.C. Circuit), but came to an accord with the FCC obviating his need to file.

[16] In *Thompson* v. *Clark*, 741 F. 2d 401, (D.C. Cir. 1984), then Judge Scalia hypothesized such a case, saying that the rule would be set aside: . . . not because the regulatory flexibility analysis was defective, but because the mistaken premise reflected in the . . . analysis deprives the rule of its required rational support, and thus causes it to violate—not any special obligation of the Regulatory Flexibility Act—but the general legal requirement of reasoned, nonarbitrary decisionmaking, ... (at 405).

> Thus, a federal agencies can ignore the burden imposed on small business until those burdens are sufficient to undercut the rationality of a rule. The probability that any particular rule will fail due to the faulty premises underpinning an incorrect regulatory flexibility analysis are rare indeed. With the potential for federal court litigation fairly remote, agencies have little to lose in ignoring their responsibilities under the RFA.[17]

In testimony this year,[18] Representative Ike Skelton pointed to a 1987 report of the House Committee on Small Business entitled: "Implementation of the Regulatory Flexibility Act—A Five Year Report". The report resulted from the work the Small Business subcommittees on Exports, Tourism, and Special Problems, chaired at that time by Representative Skelton.[19] The report discusses at considerable length the problems with enforcement of the RFA, concluding that Section 605(b) (permitting agencies to certify no significant impact on small entities) was particularly subject to abuse because the prohibition against judicial review contained in Section 611 makes it impossible to question the agency's action. The apparent conflict within the Act has been noted by the courts.[20]

In his 1993 annual report on implementation of RFA, the Chief Counsel for Advocacy of the SBA, Jere W. Glover, noted that many agencies have decided merely to use boilerplate certifications. The Counsel's report indicated that the Federal Energy Regulatory Commission, for one, has modified its procedures from providing a statement explaining its certification to a simple assertion that a rule will not have a significant impact upon a substantial number of small entities.[21] After identifying similarly recalcitrant agencies (i.e. Food and Nutrition Service, Forest Service, Bureau of Indian Affairs, and the Departments of Transportation and Justice), the report explained: "The Office of Advocacy is powerless to force agencies to provide concise statements explaining their rationale [for certification]." [22]

Thus, the most significant feature of title I of H.R. 926 is its deletion of the prohibition against judicial review contained in Section 611 of the RFA. This is in clear response to strong sentiment expressed not only during the hearings, but also from many other sources and for many years. The National Performance Review, chaired by Vice-President Gore, made deletion of the ban against judicial review its primary recommendation with respect to the Small Business Administration. Many small businesses, manufac-

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[17] Hearing on H.R. 830 Before Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 103rd Cong. 1st Sess. Serial No. 69, p. 37 (1993) (testimony of Doris S. Freeman).

[18] Hearing on H.R. 9, Before the Subcomm, on Commercial and Administrative Law of the House Comm. on the Judiciary, 104th Cong., 1st Session. (1995).

[19] H. Rep. No. 273, 100th Cong. (1987).

[20] In *Lehigh Valley Farmers* v. *Block*, supra., the court stated in a footnote: "We would be less than candid if we did not recognize that Congress theoretically rendered Sections 603 and 604 of the RFA nullities based on Sections 605 and 611. However, it for Congress to correct this anomaly if it so desires." (at 1520).

[21] Standards of Conduct and Reporting Requirements for Transportation and Affiliate Transactions of Natural Gas Pipelines, 59 Fed. Reg. 268 (1994). Although the report criticized FERC for its use of boilerplate certifications, it did note that in other ways it was one of the agencies most responsive to small business concerns because of its willingness to modify a rule after taking account of concerns raised by small entities.

[22] Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act, U.S. Small Business Administration, p.16 (1993).

turing and municipal organizations have concurred with the Vice-President.[23]

There was some concern that providing judicial review might result in an influx of court challenges to agency rules,[24] although the National Performance Review discounted its impact. Nonetheless, the committee thought it sound policy to create a right to judicial review with distinct parameters. Thus Section 101 of title I, while providing for judicial review, limits the time during which an affected small entity may seek judicial review to 180 days after the effective date of an agency's rule, or, in cases where an agency has delayed the issuance of a final regulatory analysis because of an emergency, 180 days after the final regflex analysis has been made available to the public.[25] If a shorter time period is provided by law under which the rule was promulgated, then the shorter time period controls.[26]

But, beyond judicial review there are other ways to promote the successful functioning of the RFA and H.R. 926 attempts to do so.

The Office of Chief Counsel for Advocacy within the Small Business Administration was established by law in 1976.[27] The law gives the Counsel a wide variety of responsibilities which are aimed at making the SBA and other Federal agencies sensitive to the concerns of small business and vice-versa. The Counsel was subsequently entrusted oversight responsibility of RFA.[28] Drafters of H.R. 830 of the 103rd Congress, upon which H.R. 926 is based, argued that one way to ensure a successful RFA is to bolster the Counsel in his oversight role. Thus, they proposed that Counsel be given advance notification of proposed federal rules so that he can comment upon them to the agency before they are published.

It is obviously desirable that rules be drafted so well that they never need to be challenged. One way this quality of product can be achieved with respect to the particular concerns of small entities is to provide for pre-publication review by the Chief Counsel for Advocacy. As the principal sponsor, Representative Thomas Ewing noted: "This would involve that office in this process at an earlier stage. Advocacy should be working hand-in-hand with the regulators to write rules which meet the requirements of the RFA and keep the agencies out of court."[29] The committee agreed with the drafters, although it should also be noted that the Counsel's role is only to comment and suggest. He cannot veto an agency's proposed rule.

As was discussed above, the Counsel is authorized by law to appear as amicus curiae in his oversight function with respect to the RFA. But, given the history of the RFA, it appears useful at this point to restate this authority as a sense of Congress.

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[23] See Hearings on H.R. 9, supra. Also, Hearings on H.R. 930 before Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, Rep. No. 69, 103rd Cong. (1993).

[24] Hearing on H.R. 830, ibid 63–9 (testimony of Professor Thomas O. McGarity, University of Texas Law School).

[25] Section 101(2)(B) of H.R. 926.

[26] Section 101(2)(A) of H.R. 926.

[27] P.L. 94–305, Title II, Sec. 201. 15 U.S.C. 634a et seq.

[28] 5 U.S.C. 612.

[29] Hearing on H.R. 830, supra. See also the statement of James W. Morrison, appearing on behalf of the National Association of the Self-Employed, who suggested that pre-publication notification could remedy the lack of useful effect from 5 U.S.C. 602 regarding the provision of regulatory agendas to the Counsel. Id. at 79.

TITLE II

The methods by which the Federal government promulgates and enforces regulations is a subject which has received increased scrutiny in the past three decades. Since 1887, when Congress established the first modern day regulatory agency, the Interstate Commerce Commission, to regulate American railroads, the Federal government has liberally increased its role in regulating American business.[30] However, by the 1960's and 1970's, this unfettered growth of Federal agencies and the cumbersome process by which they implement regulatory actions had attracted many critics.

Consequently, starting in the mid-1970's five successive U.S. presidents attempted, through the Executive branch, to impose some criteria on the agency rulemaking process. Beginning in 1974, a series of executive orders were initiated to impose objective standards upon the process, and to attempt to measure the impact of regulations created pursuant to that process. In 1974 and 1976 respectively, President Ford imposed an "Inflationary Impact Analysis" on regulations, and then an "Economic Impact Analysis" on the rulemaking process.[31] In 1978, President Carter called for "Economic Impact Statements" on regulations,[32] and in 1981, President Reagan in his order on "Federal Regulations" required regulatory impact analysis to be completed on all regulations before they could be issued,[33] Most recently, in 1993, President Clinton imposed a "Regulatory Planning Review" on the rulemaking process.[34] This Executive branch movement toward measuring and curbing what appears to be the inevitable growth of federal regulations has generated support during the past two decades for legislative efforts with similar goals.

Title II of H.R. 926, entitled "Regulatory Impact Analysis" is the most recent legislative product of sporadic congressional efforts which began over thirty years ago.[35] The most successful of those efforts culminated in 1982, when the Senate passed S. 1080, the "Regulatory Reform Act", by a vote of 94 to 0.[36] This legislation represents the first viable legislative attempt, since the demise of S. 1080, to codify improvements to the agency rulemaking process

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[30] Since 1887, 56 regulatory agencies have been created; and as of June 1994, those agencies collectively employ over 131,000 regulatory staff.

[31] Exec. Order No. 11821, 3 C.F.R. 926 (1971–1975 compilation) and Exec. Order No. 11949, 3 C.F.R. 161 (1976).

[32] Exec. Order No. 12044, 43 Fed. Reg. 12661 (1978).

[33] Exec. Order No. 12291, 3 C.F.R. 127 (1982). President Bush continued to enforce Executive Order 12291 during his administration.

[34] Exec. Order No. 12866, 58 Fed. Reg. 51735 (1993).

[35] In the 88th Congress, in 1964, the Subcommittee on Administrative Practice and Procedure [of the Senate Judiciary Committee] held three days of hearings and heard from 36 witnesses on a bill intended to update and improve the procedural rules that govern proceedings before departments and agencies. Hearings on this subject continued in the 89th, the 94th, and the 95th Congresses. [During the 96th Congress], the Subcommittee on Administrative practice and Procedure [of the Senate Judiciary Committee] embarked on an ambitious schedule of ten days of hearings, receiving testimony from over 100 witnesses on all manner of regulatory reform. During the [96th Congress], the [Senate] Committee on Governmental Affairs held eleven days of hearings on Regulatory Reform legislation and heard testimony from 80 witnesses. S. Rep. No. 284, 98th Cong., 1st Sess. 1–2 (1981).

[36] Despite the overwhelming and bipartisan support for the bill in the Senate, S. 1080 was never afforded a vote in the House. S. 1080 contained provisions which are similar to those of this title, including a requirement that Federal agencies complete and publish a preliminary and final regulatory impact analysis during the consideration of, and upon publication of a major rule.

which executive orders have temporarily imposed during the past three decades.

Without question it is the Executive branch which is charged with enforcing the laws Congress passes; and agencies are the governmental entities within the Executive responsible for crafting the regulations by which to implement Federal laws. However, Congress has the power to address the Federal agency rulemaking process and did so comprehensively in 1946, with the enactment of the "Administrative Procedure Act" (APA), which is codified in title 5 of the U.S. Code.[37] The failure to date of the Executive branch to comprehensively discipline the rulemaking process is due in part to the limited authority of executive orders. An executive order cannot amend the primary rulemaking statute, the APA; and an executive order can easily be repealed simply by the issuance of a subsequent order.[38]

A major impetus for the drafting of title VII of H.R. 9, the predecessor to this title, was frustration by many in the business community at the revocation of President Reagan's Executive Order 12291 by President Clinton.[39] The Reagan Executive Order not only mandated completion by agencies of a regulatory impact analysis, but provided substantial enforcement authority to the director of OMB to oversee agency compliance. The subsequent Clinton Executive Order is generally less imposing on agencies, provides more agency discretion, and grants less enforcement authority to the director of OMB.[40]

The literal differences between Reagan Executive Order 12291 and Clinton Executive Order 12866 are fundamental. While the Clinton Order addresses the same topics as Executive Order 12291,

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[37] 5 U.S.C. § 551 et seq.

[38] A recent example of the ephemeral nature of executive orders is the revocation of President Reagan's 1981 Executive Order 12291, supra, by President Clinton's Executive Order 12866, supra, on September 30, 1993. The repeal of Reagan's Order by President Clinton did not require any action by the Legislative branch, and is not subject to review by the Judicial branch; it is simply an internal Executive branch mechanism.

[39] "The regulatory impact analysis you are considering today is the result of meetings with scores of business leaders and individuals throughout the country who have found themselves snagged in government red tape, ..." Hearings on H.R. 9, *supra* (testimony of Congressman Bob Franks).

[40] For example, the language of Reagan Executive Order 12291 provides in part the following:

> To permit each proposed major rule to be analyzed in light of the requirements of this Order . . . each preliminary and final regulatory impact analysis *shall contain* the following information: (1) a description of the potential benefits of the rule . . ., (2) a description of the potential cost of the rule . . ., (3) a determination of the net benefits of the rule . . ., (4) a description of alternative approaches that could substantially achieve the same regulatory goal at a lower cost . . .,
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> Upon the request of the director, an *agency shall consult* with the director concerning the review of preliminary regulatory impact analysis . . . and *shall . . . refrain from publishing* its preliminary regulatory impact analysis . . . until such review is concluded. (*Emphasis added*)

By contrast, the language of Clinton Executive Order 12866, provides in part the following:

> To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies *should adhere to the following principles,* to the extent permitted by law and where applicable: (1) each agency shall identify the problem it intends to address . . ., (2) each agency shall examine whether existing regulations . . . have created, . . . the problem that a new regulation is intended to correct . . ., (3) each agency shall identify and assess available alternatives to direct regulation, . . . (4) in setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed. . . .
>
> Coordinated review of a agency rulemaking is necessary to ensure that regulations are consistent with applicable law, ... The Office of Management and Budget shall carry out that review function. . . . To the extent permitted by law, *OMB shall provide guidance* to agencies . . . and shall be the entity that reviews individual regulations. . . . (*emphasis added*)

its language is significantly different, and tends to weaken rather than strengthen regulatory analysis in the Executive branch. Specifically, the express regulatory impact analysis and decisional criteria provisions of the Reagan Order are replaced in Clinton's Order with general statements of "Regulatory Philosophy" and "Principles of Regulation" that speak in the more benign "shoulds" rather than the Reagan Order's mandatory "shalls". A consequence of President Clinton's revocation of the 1981 Reagan Order was the incorporation by reference of Executive Order 12291 into the legislative language of title VII of H.R. 9.

Title II of H.R. 926 represents a substantial rewrite of title VII of H.R. 9. Reagan Executive Order 12291 is not incorporated by reference into title II as it was in H.R. 9. Instead, the APA, specifically section 553 of title 5, is amended to include some original and some amended provisions of Executive Order 12291. For example, title II contains a reduced set of impact analysis criteria, which was created, in part, through combining language from the previous Reagan Order and from title VII of H.R. 9. Furthermore, the definition of a major rule, pursuant to this legislation, will now be included within the definition provision of the APA, but generally reflects the definition of a major rule from prior Executive Order 12291.

TITLE III

Title III of H.R. 926 is derived from title VIII of H.R. 9, which sought to provide a citizen's regulatory bill of rights and protection for private sector whistleblowers. The Commercial and Administrative Law Subcommittee heard testimony and received other evidence indicating the presence of regulatory abuse and its disruptive effects on the confidence that citizens and businessmen alike should have in the functioning of their government. There is, furthermore, a perception that retaliatory actions may be taken by government agencies against private sector whistleblowers, and such perceptions can have very real consequences in determining whether a person decides to come forward with his or her evidence. As Representative Tom DeLay advised the Subcommittee during the hearing on title VIII, "Our constituents struggle daily to comply with an unending array of regulatory requirements [and] at the very least they should feel free to speak openly about regulatory actions taken against them that they believe to be unfair."

There is clearly broad agreement that persons who are the subjects of regulatory abuse should as a matter of course be protected from abuse by regulators, and that persons who criticize regulators should be protected from reprisals against such criticism. These are the concerns that underlie this title.

After discussions among the Members and careful consideration of the testimony and other communications received, it was decided that the concerns giving rise to title VIII would be best met at this time as follows: The President, pursuant to his authority under 5 U.S.C. 7301, is directed within 180 days of enactment to prescribe regulations for employees of the executive branch of government to insure that Federal laws and regulations shall be administered consistent with the principle that any person shall, in connection with the enforcement of such laws and regulations, (1) be protected

from abuse, reprisal, or retaliation, and (2) be treated fairly, equitably, and with due regard for such person's rights under the Constitution.

Recent examples of the exercise of the President's authority under 5 U.S.C. 7301 to "prescribe regulations for the conduct of employees in the executive branch" would include executive orders relating to a drug-free Federal workplace,[41] setting forth principles of ethical conduct for government officials and employees[42] and prescribing ethical commitments by executive branch appointees.[43]

The regulations issued pursuant to title III prohibiting regulatory abuse and retaliation and requiring fair and equitable treatment should receive the broadest possible dissemination throughout the executive branch. Their content should also be incorporated into agency training, agency field manuals, and elsewhere as appropriate. In the future, the Committee anticipates that it may conduct regular oversight hearings into the subject of regulatory abuse and reprisals by agencies of the Federal Government.

HEARINGS

The Committee's Subcommittee on Commercial and Administrative Law held two days of hearings on titles VI, VII and VIII of H.R. 9, the precursors of titles I, II and III of H.R. 926, on February 3 and 6, 1995.

Testimony on title VI was received on February 3 from the following witnesses: Representative Ike Skelton; Representative Tom Ewing; John Spotila, General Counsel, Small Business Administration; Jere Glover, Chief Counsel for Advocacy, Small Business Administration; Joseph Stehlin, representing Green Cove Maritime, Inc.; Rick Stadelman, Executive Director, Wisconsin Towns and Townships; Bennie Thayer, President of the National Association of Self-Employed; Donald Dorr, Esq., representing the U.S. Chamber of Commerce; James P. Carty, Vice President of Small Manufacturers, National Association of Manufacturers; Kim McKernan, Director of House Governmental Affairs, National Federation of Independent Businessmen; and David Vladek, representing Public Citizen.

Testifying on title VIII on February 3 were Representative Tom DeLay; Jamie Gorelick, Deputy Attorney General, United States Department of Justice; Edward Hudgins, Director of Regulatory Studies at the CATO Institute; and Susan Eckerly, Deputy Director of Economic Policy at the Heritage Foundation. Testimony was received from Professor Thomas O. McGarity of the University of Texas School of Law, who at the time of his scheduled appearance was testifying before another Congressional committee and was made part of the record.

On February 6, the Subcommittee heard testimony on title VII from the following persons: Representative Bob Franks; Representative David McIntosh; Sally Katzen, Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget; Cornelius E. Hubner, President of the American Felt

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[41] Exec. Ord. No. 12564. 51 Fed.Reg. 32889 (1986).

[42] Exec. Ord. No. 12674, 54 Fed.Reg. 15159 (1989), as amended by Exec. Ord. No. 12731, 55 Fed.Reg. 42547 (1990).

[43] Exec. Ord. No. 12834, 58 Fed.Reg. 5911 (1993).

and Filter Company; Brian Maher, President of Maher Terminals; Al Wenger, Executive Officer, Wenger Feed Mills; Ed Dunkelberger, Esq., representing the National Food Processors Association; C. Boyden Gray, Esq.; David Hawkins, Senior Attorney, Natural Resources Defense Council; James C. Miller, representing Citizens for a Sound Economy; Thomasina Rogers, Chair of the Administrative Conference of the United States, accompanied by Ernest Gellhorn, Esq.; Gary Bass, Executive Director, OMB Watch; and George C. Freeman, Jr., Esq., Chairman of the American Bar Association's Working Group on Regulatory Reform.

Additional material was submitted by a number of individuals and organizations.

COMMITTEE CONSIDERATION

On February 16, 1995, the Committee met in open session and ordered reported the bill H.R. 926, with amendments, by voice vote, a quorum being present.

VOTE OF THE COMMITTEE

There were three amendments adopted by voice vote. The first was an amendment offered by Mr. Gekas which provides an exemption from the pre-publication notification requirements of section 102 for certain monetary agencies. The second was an amendment offered by Mr. Schumer which provides an exemption for certain monetary agencies from OMB enforcement authority over the impact analysis requirements of title II. The third was an amendment offered by Mr. Reed which limits the period for review of the OMB director to 90 days regarding preliminary and final impact analyses and proposed final rules.

There were recorded votes on four amendments during the Committee's consideration of H.R. 926, as follows:

1. An amendment offered by Mr. Frank to an amendment by Mr. Gekas regarding an exemption for certain banking agencies from the pre-publication requirement to notify the Chief Counsel for Advocacy of the SBA. Defeated 13–16.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Ms. Schroeder	Mr. Moorhead
Mr. Frank	Mr. McCollum
Mr. Schumer	Mr. Gekas
Mr. Boucher	Mr. Coble
Mr. Bryant (Texas)	Mr. Schiff
Mr. Reed	Mr. Gallegly
Mr. Nadler	Mr. Canady
Mr. Scott	Mr. Inglis
Mr. Watt	Mr. Goodlatte
Mr. Serrano	Mr. Buyer
Ms. Lofgren	Mr. Bono
Ms. Jackson Lee	Mr. Heineman
	Mr. Bryant (Tennessee)
	Mr. Flanagan
	Mr. Barr

2. A Substitute amendment to the Schumer amendment offered by Mr. Watt, further exempting monetary agencies from the regulatory impact analysis requirements of title II. Defeated 13–19.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Ms. Schroeder	Mr. Moorhead
Mr. Frank	Mr. Sensenbrenner
Mr. Schumer	Mr. McCollum
Mr. Boucher	Mr. Gekas
Mr. Bryant (Texas)	Mr. Coble
Mr. Reed	Mr. Schiff
Mr. Nadler	Mr. Gallegly
Mr. Scott	Mr. Canady
Mr. Watt	Mr. Inglis
Mr. Serrano	Mr. Goodlatte
Ms. Lofgren	Mr. Buyer
Ms. Jackson Lee	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (Tennessee)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

3. An amendment offered by Mr. Reed increasing the monetary threshold for defining a "major rule" in title II from $50 million to $100 million. Defeated 13–19.

YEAS	NAYS
Mr. Conyers	Mr. Hyde
Ms. Schroeder	Mr. Moorhead
Mr. Frank	Mr. Sensenbrenner
Mr. Schumer	Mr. McCollum
Mr. Boucher	Mr. Gekas
Mr. Bryant (Texas)	Mr. Coble
Mr. Reed	Mr. Smith (Texas)
Mr. Nadler	Mr. Schiff
Mr. Scott	Mr. Gallegly
Mr. Watt	Mr. Canady
Mr. Serrano	Mr. Inglis
Ms. Lofgren	Mr. Goodlatte
Ms. Jackson Lee	Mr. Hoke
	Mr. Bono
	Mr. Heineman
	Mr. Bryant (Tennessee)
	Mr. Chabot
	Mr. Flanagan
	Mr. Barr

4. An amendment offered by Mr. Conyers requiring that all contracts to an agency regarding informal rulemakings be described, recorded and made available to the public. Defeated 14–19.

YEAS	NAYS
Mr. Conyers	Mr. Hyde

Ms. Schroeder
Mr. Frank
Mr. Schumer
Mr. Berman
Mr. Boucher
Mr. Bryant (Texas)
Mr. Reed
Mr. Nadler
Mr. Scott
Mr. Watt
Mr. Serrano
Ms. Lofgren
Ms. Jackson Lee

Mr. Moorhead
Mr. Sensenbrenner
Mr. McCollum
Mr. Gekas
Mr. Coble
Mr. Smith (Texas)
Mr. Schiff
Mr. Gallegly
Mr. Canady
Mr. Inglis
Mr. Goodlatte
Mr. Hoke
Mr. Bono
Mr. Heineman
Mr. Bryant (Tennessee)
Mr. Chabot
Mr. Flanagan
Mr. Barr

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to H.R. 926, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 23, 1995.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 926, the Regulatory Reform and Relief Act.

Enactment of H.R. 926 could effect direct, spending. Therefore, pay-as-you-go procedures would apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM
(For Robert D. Reischauer, *Director*).

Enclosure.

1. Bill number: H.R. 926.

2. Bill title: Regulatory Reform and Relief Act.

3. Bill status: As ordered reported by the House Committee on the Judiciary on February 17, 1995.

4. Bill purpose: Title I of H.R. 926 would permit small entities to petition for judicial review of a federal agency's compliance with the requirements of the Regulatory Flexibility Act. The bill also would require that a federal agency transmit to the Small Business Administration (SBA) a copy of any proposed rule (and the agency's initial regulatory flexibility analysis, if required) at least 30 days prior to the publication of the notice of proposed rulemaking. The SBA would be permitted to transmit to the proposing agency the SBA's analysis of the proposed rule's effects on small business.

Title II of the bill would make several changes to the current laws relating to federal rulemaking. These provisions would apply to most agency rules expected to have an effect on the economy of at least $50 million annually. First, the bill would require a 90-day advanced notice to the public of proposed rulemaking. Second, H.R. 926 would require agencies to hold an informal hearing on a rule if more than 100 persons request such a hearing, and to extend the public comment period on proposed rules by 30 days if more than 100 persons make such a request. Third, the bill would require agencies to prepare a preliminary regulatory impact analysis along with the public notice of proposed rulemaking, in addition to a final regulatory impact analysis.

Title III of H.R. 926 would require the President, within 180 days of enactment of the bill, to prescribe guidelines to protect private sector whistleblowers from retaliation by federal regulatory agencies.

5. Estimated cost to the Federal Government:

Title I.—Federal agencies required to file regulatory flexibility analyses would incur some additional costs in transmitting the required documents to the SBA, but CBO does not expect these costs to be significant. Based on information from the SBA, CBO estimates that reviewing proposed rules and preparing analyses of their effects on small businesses would cost the federal government

approximately $200,000 per year over the next five years, assuming appropriation of the necessary amounts.

Title II.—We estimate that enactment of Title II of H.R. 926 would increase the cost of issuing and reviewing regulations by the major federal regulatory agencies by at least $150 million annually. Few of the agencies that would be affected by this bill have had time to systematically study the additional costs that its implementation would impose. The provisions are similar to the work most agencies now conduct for some regulations expected to have an economic impact greater than $100 million annually. This estimate assumes that agencies will try to adhere to their current schedules for implementing new regulations and revising existing rules. CBO has insufficient information at this time to estimate the cost impacts of this bill on all federal agencies; however, we believe the major cost impacts would fall upon the agencies discussed below.

EPA currently spends more than $120 million annually on regulatory impact analysis to support rule making efforts for regulations expected to have an economic impact greater than $100 million annually. Based on preliminary information from the agency, we estimate that requiring regulatory impact analysis for regulations with annual economic impacts of $50 million or more would increase the agency's costs by $50 million to $100 million annually.

The Department of Agriculture (USDA) currently prepares regulatory impact assessments, environmental impact statements, and risk analyses for all regulatory actions affecting human health, safety, or the environment that are expected to result in annual costs to the economy of more than $100 million. Based on information from USDA, we estimate that lowering the threshold for these analyses would increase the number of assessments and cost/benefit studies by 50 to 100 each year. The additional costs associated with such assessments and studies range from less than $100,000 for a relatively routine rule to several million dollars for a major regulatory change. CBO estimates that most of the additional work would cost $150,000 to $250,000 per analysis, or an additional $10 million to $25 million annually for the department.

Based on information from the Food and Drug Administration, CBO estimates that the bill's requirements would add less than $15 million annually to the agency's current spending on pre-market regulatory activities.

The Department of the Interior currently spends about $50 million per year for regulatory analysis. This work is carried out primarily by the Office of Surface Mining, the Minerals Management Service, and the Bureau of Land Management as part of their overall regulatory enforcement activities. Lowering the threshold for regulatory analyses from $100 million to $50 million would increase the number of analyses these agencies would have to prepare, resulting in additional annual costs of less than $20 million.

Requirements in Title II of H.R. 926 also would increase costs for the Occupational Safety and Health Administration, the Mine Safety and Health Administration, and the Consumer Product Safety Commission. Based on information from these agencies, CBO estimates that enactment of the bill would result in total additional costs of less than $15 million per year for these agencies.

The Department of Energy, Department of Transportation, and Department of Defense would incur additional costs to implement the bill. CBO cannot quantify the impact on these agencies at this time, but the additional costs could be significant.

6. Comparison with spending under current law: CBO estimates that enactment of this bill would add at least $150 million annually to the cost of issuing regulations.

7. Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. Enactment of H.R. 926 could affect direct spending; therefore, pay-as-you-go procedures would apply to the bill.

Enactment of Title I of H.R. 926 could result in additional lawsuits against the federal government requesting judicial review of federal agency compliance with the requirements of the Regulatory Flexibility Act. To the extent that the additional lawsuits were successful and the plaintiffs were awarded attorney's fees, enactment of H.R. 926 could result in additional direct spending because these fees are paid from the Claims, Judgments and Relief Acts account. CBO cannot estimate either the likelihood or the magnitude of the direct spending, because there is no basis for predicting either the outcome of possible litigation or the amount of potential compensation.

8. Estimated cost to State and local governments: How enactment of H.R. 926 would affect the budgets of state and local governments is unclear. If regulations that would impose additional requirements on state and local governments are delayed by the enactment of these provisions, then costs to these entities would be less. It is also possible, however, that some regulatory actions that would otherwise provide relief to state and local governments could be delayed, thereby increasing their costs for various activities. CBO has no basis for predicting the direction, magnitude, or timing of such impacts.

9. Estimate comparison: None.

10. Previous CBO estimate: None.

11. Estimate prepared by: John Webb and Mark Grabowicz (226–2860), and Connie Takata (226–2820).

12. Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 926 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS

TITLE I—STRENGTHENING REGULATORY FLEXIBILITY

Section 101—Judicial review

Currently, 5 U.S.C. 611 generally bars judicial review of the Regulatory Flexibility Act. Judicial review is provided only in those

limited instances when an action for judicial review is instituted on other grounds and only to the extent that the regflex analysis is to be made part of the record to be considered by the court in those cases. Not reviewable is an agency's certification that a regflex analysis is not required, nor is the adequacy of the analysis unless considered as a part of a larger challenge.

Section 101 creates a new 5 U.S.C. 611 which in subsection (a)(1) grants judicial review of compliance with regflex to affected small entities but requires that they must petition within 180 days after the effective date of the final rule they seek to challenge. The challenge must be brought to the court having jurisdiction to review such rule for compliance with the provisions of the Administrative Procedure Act or any other provision of law.

Subsection (a)(2)(A) provides that where a provision of law requires that an action challenging a final agency regulation be commenced before 180 days, a challenge based upon the RFA must be brought within that shorter time. Subsection (a)(2)(B) covers those situations where an agency has foregone the issuance of a regflex analysis because it was operating under an emergency situation described in Section 608 of the Act. In those cases, an affected small entity has 180 days to seek judicial review from the date the analysis is made available to the public or within a shorter period if a law requires a challenge be brought in such a shorter time.

Subsection (a)(3) defines "affected small entity" as one that is or will be adversely affected by the rule. Thus, if a rule creates requirements that will be imposed on identifiable small entities at a time certain in the future, aggrieved entities must seek judicial review within the time period established in the bill.

Subsection (a)(4) states that nothing in the subsection shall be construed to affect a court's authority to stay a rule's effective date. A court is left to determine what is appropriate under the circumstances, consistent with its authority, but should consider the availability of remedies described subsections (5) and (6) following.

Subsection (5)(A) gives a court reviewing a challenge under the RFA the authority to order an agency to prepare a regflex analysis if the agency has improperly certified that a proposed rule would not have a significant impact on a substantial number of small entities. The standard that the court is to follow is that, on the basis of the rulemaking record, the certification was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

If the agency has prepared a final regflex analysis, subsection (5)(B) authorizes the court to order the agency to take corrective action consistent with Section 604 of the RFA (which describes what should be in a final regflex analysis.)

Subsection (6) grants agencies a 90-day period in which to take corrective action pursuant to Subsection (5). If after that period the agency has not complied, the court may stay the rule or grant such other relief as it deems appropriate.

Subsection (7) requires the court to take due account of the rule of prejudicial error.

Subsection (7)(b) provides that in an action for judicial review of a rule, a regflex analysis shall be considered part of the whole record of agency action in connection with such review.

Subsection (7)(c) states that nothing in the section bars judicial review of any other impact statement or analysis required or permitted by another law.

Subsection 101(b) provides that the amendments contained in subsection (a) apply only to final agency rules issued after the date of enactment.

Section 102—Rules commented upon by SBA Chief Counsel for Advocacy

Section 102(a) amends 5 U.S.C. 612 by adding to it a new subsection (d). The new subsection attempts to bolster the role of the Chief Counsel for Advocacy of the Small Business Administration by providing in subparagraph (1) that when an agency promulgates rules, it must send them to the Chief Counsel at least 30 days prior to the publication of a general notice of proposed rulemaking. Subparagraph (2) gives the Chief Counsel fifteen days to transmit a written statement to the agency discussing the effect of the proposed rule on small entities. Subparagraph (3) provides that the Chief Counsel's statement, together with any response by the agency, shall be published in the Federal Register at the time of publication of the general notice of proposed rulemaking for the rule. Subparagraph (4) was added during committee consideration as an amendment offered by Representative Gekas. It provides an exception to the requirement that proposed rules be sent to the Chief Counsel prior to publication for those issued by an "appropriate banking agency",[44] the National Credit Union Administration or the Office of Federal Housing Enterprise Oversight in connection with the implementation of monetary policy or to ensure the safety and soundness of federally insured depository institutions, any affiliate of such an institution, credit unions, or government sponsored housing enterprises or to protect the Federal deposit insurance funds. The exception recognizes that in this narrow class of situation, given the volatility of financial markets and their sensitivity to information, it would be not be advantageous to provide advance notice to the Chief Counsel.

Section 103—Sense of the Congress regarding the SBA Chief Counsel for Advocacy

Section 103 merely states as the sense of Congress that the Chief Counsel for Advocacy of SBA should be permitted to appear as amicus curiae in any action or case brought in a federal court to review a rule. Section 612 of title 5 gives the Chief Counsel that authority, but it is viewed as useful in the context of the Chief Counsel's responsibilities and his position within the federal bureaucracy to restate this point.

TITLE II—REGULATORY IMPACT ANALYSIS

Section 201—Definitions

Section 201 makes two amendments to section 551 of title 5 of the U.S. Code. First, section 201 adds a new paragraph (15) to section 551 defining "major rule". A "major rule" is generally defined

[44] Reference is made to the definition of that term in Section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

to mean any rule that is likely to result in an annual effect on the economy of $50 million or more; or result in a major increase in costs for consumers, industries, or government agencies; or result in significant adverse effects on employment or productivity, or on the ability of U.S. companies to compete with foreign companies in export markets. This definition is identical to that found in previous Executive Order 12291 issued by President Reagan on February 17, 1981 except for the monetary threshold of $50 million. The monetary threshold in the prior Reagan Order was set at $100 million.

The definition of a major rule is pivotal to this legislation since only major rules are subject to the impact analysis requirements mandated by this title. The determination of the level at which to set the monetary threshold was significant for the business community who supported title VII of H.R. 9. A major rule in H.R. 9 was defined to mean any proposed rulemaking which affects more than 100 persons or compliance with which requires the expenditure of more than $1 million by any single person. That definition which established a relatively low trigger for requiring impact analysis attracted many comments on H.R. 9.

Most of the witnesses who testified at the Subcommittee's hearing on February 6, 1995, regarding title VII of H.R. 9 encouraged the Committee to raise the monetary threshold for the definition of a major rule contained in the bill. Witnesses suggested that defining a major rule at too low a threshold would require impact analysis on so many perfunctory and innocuous rulemakings that it would be wasteful; and indicated that covering too many rules would dilute OMB's enforcement effectiveness.[45] However, some witnesses testifying on behalf of the business community emphasized the need to lower the definition of a major rule from the current level of $100 million set forth in Clinton Executive Order 12286. At least one witness encouraged the Committee to lower the monetary threshold of the definition to below that contained in title VII.[46] The major rule definition in this section represents a compromise between the competing interests, who are effected by the rulemaking process of the Administrative Procedure Act.

Section 201 adds another paragraph (16) to section 551 to clarify that the term ''director'' as used in title II means the director of OMB. Where the term ''director'' is used in title II to mean a person other than the director of OMB, its use is distinguished by the specific language of the relevant subsection which includes that term.

Section 202—Rulemaking notices for major rules

Under current law, section 553 of title 5 of the U.S. Code is that provision of the APA which governs the process of informal rulemaking. Section 201 amends section 553 by adding a new subsection (f) which creates new notice procedures and adds new substantive requirements to the current notice provisions. Subsection

[45] See Hearings on H.R. 9 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995) (testimony of Sally Katsen, Administrator of the Office of Information and Regulatory Affairs, and C. Boyden Gray, Esquire).

[46] Id., (testimony of Cornelius E. Hubner).

(f) requires a new Advance Notice of Proposed Rulemaking to be published at least 90-days prior to the currently required ''general notice.'' This new requirement is significant in that it provides the public considerably more notice of an agency's impending rulemaking activities and allows the public to become involved in the process at a substantially earlier point than current practice generally provides. Current law, pursuant to section 553, only requires agencies to provide ''general notice'' to the public regarding informal rulemaking. Agencies have the discretion to determine limitations for the general notice requirement; which in practice, ranges between 15 to 45 days.

Section 202 requires that the advance notice of proposed rulemaking include ''to the extent possible'' some of the information required in a regulatory impact analysis. This information, is to include an explanation of the necessity of the rule as set forth by the agency and of the specific legal authority upon which the rulemaking is based. Furthermore, such notice should include an analysis of alternative approaches available to the agency that could have achieved the same regulatory goal, together with an explanation as to why those alternatives were not adopted. This provision is an attempt to ensure that the advance notice required in this section is sufficiently substantive to provide meaningful guidance to the public regarding the purpose and legitimacy of a rulemaking, and to make available to the public an agency's analysis of potential alternative methods.

The limiting words, ''to the extent possible'' are included in section 202 regarding the advance notice requirement due to practical considerations. It is not likely, with regard to all major rules, that 90-days prior to a general notice, an agency will be in a position to articulate all the information required in new subsections (i)(4)(B) and (D). However, it is expected that much information will be available to an agency at this point in time with regard to many rules; and therefore, despite some latitude the requirement is mandated.

A significant provision in the new subsection (f) of the APA is the requirement that agencies provide a preliminary impact analysis of a rule at the time the general notice of proposed rulemaking is provided. An impact analysis is a significant agency review of potential costs and benefits of a rule including explanations of agency determinations.[47] The requirement to make a preliminary impact analysis available to the public, at the general notice stage, is intended to give the public an opportunity to comment upon specific agency determinations and conclusions regarding a pending rulemaking. this new procedural requirement allows the public the opportunity for a substantially more detailed review of a potential rule during the comment period, than current law presently allows. The Committee is hopeful that this additional information will allow the public to more substantively impact the content of a final rule.

Finally, section 202 requires agencies to include a final regulatory impact analysis together with the statement of basis and purpose for a final major rule. This provision also places the bur-

[47] See specific discussion of regulatory impact analysis—Section 204 herein.

den on the agency to delineate all changes in the final impact analysis from any information which the agency provided at the advance notice stage. In other words, if the agency's explanation of the necessity or legal authority of a rule, or its analysis of potential alternative approaches that could have been adopted has changed between the time of the advance notice and the time of the final rule, the agency must describe those changes in a way that informs the public of the differences.

Section 203—Hearing requirement for proposed rules; and extension of comment period

Section 203 of title II adds a new subsection (g) to section 553 of title 5 of the U.S. Code for the purpose of providing two procedural changes. First, new subsection (g) provides that if more than 100 interested persons acting individually submit requests for a hearing to an agency regarding any rule, then the agency shall hold such a hearing on the proposed rule. To the extent that a hearing on a proposed rule gives the public an opportunity to interact with an agency and express their views on agency determinations, this new procedural requirement would appear inconsequential. However, considered together with the new requirement that a preliminary regulatory impact analysis be provided at the general notice stage (as provided under section 202 herein), individuals who have reviewed such analysis may be able to have a significant impact on the direction an agency has indicated with regard to a proposed rulemaking. The requirement in new subsection (g) that the 100 interested persons "individually submit requests," is intended to require that 100 different interested persons make such requests. It is not intended to allow, for example, 100 employees of one company to make such requests and mandate agency compliance. It should also be noted that the type of hearing contemplated by section 203 is not a formal agency hearing but is intended to be merely a public hearing, organized and noticed by the agency.[48]

Section 203 adds a new subsection (h) to section 553 of title 5 of the U.S. Code. New subsection (h) provides that if during the 90-day period beginning on the date of the advance notice of proposed rulemaking, required under new subsection (f), more than 100 persons individually contact an agency to request an extension of the public comment period pursuant to subsection (c) of section 553 of title 5, that the agency shall provide an additional 30-day period; and may not adopt a rule until that additional 30-day period expires. The comment period provided for under current law, may become more significant, in the event that the new advance notice and preliminary impact analysis requirements of this legislation become law. If these new provisions, as contemplated, provide the public an opportunity for more informed participation in agency rulemaking, then additional time within which to prepare substantive comments to an agency may be advantageous. It is important to note, that as with subsection (g), the requirement that "more than 10 persons individually contact the agency", is intended to require contact by 100 different individuals; and is not intended

[48] The type of hearing contemplated in this provision is not the type of hearing required by section 554 of title 5 of the U.S. Code.

to allow, for example, 100 employees of one company to trigger agency compliance.

New subsection (h) amends section 553(c) of title 5 of the U.S. Code by placing the current language of subsection (c) into a new paragraph (1), and by creating a new paragraph (2). New paragraph (2) shall require agencies to publish in the Federal Register all comments submitted to the agency on a proposed rulemaking. This provision is intended to confirm that agencies are required to publish general responses to the substance of comments received by an agency which are relevant to the subject matter of a proposed rulemaking. This provision is not intended to require an agency to publish an individual response to each and every comment received by an agency regarding such rulemakings.

Section 204—Regulatory impact analysis

Section 204 of title II amends section 553 of title 5 of the U.S. Code by adding new subsection (i). Subsection (i) generally requires that agencies prepare and consider a regulatory impact analysis for every major rule. This provision makes clear that agencies shall have the discretion to determine whether the rule is a major rule pursuant to the definition provided in section 201 herein. Furthermore, subsection (i) provides the Director of OMB with the authority to order a rule, not so defined, to be treated as a major rule or to require any set of related rules, not defined as major rules, to be considered together as one major rule. This provision is intended to grant the OMB Director considerable discretion in requiring any particular rule or set of related rules to be subject to the impact analysis requirements of this legislation.

Subsection (i) creates procedures pursuant to which an agency must abide for the transmitting of impact analysis to the Director of OMB. Specifically, this provision requires a preliminary regulatory impact analysis to be transmitted along with a notice of proposed rulemaking to the Director at least 60 days prior to publication of the proposed rulemaking. Furthermore, subsection (i) requires a final regulatory impact analysis to be transmitted to the Director together with the final rule at least 30-days prior to the publication of a major rule. These time frames are intended to give the OMB Director sufficient time to review these analyses prior to publication.

Most significantly, new subsection (i)(4) sets forth the specific information which each preliminary and final regulatory impact analysis must contain. The seven analysis criteria set forth in (i)(4) are the result of the reduction by elimination and combination of the twenty-three criteria originally included in title VII of H.R. 9. Subparagraph (i)(4)(A) requires an agency to provide a description of the potential benefits of a rule, and to identify the individuals likely to receive those benefits. Subparagraph (i)(4)(B) requires an agency to explain the necessity and reasonableness of a rule and to set forth the specific legal authority upon which a rule is based; and requires a description of the condition the rule is to address. Subparagraph (i)(4)(C) requires an agency to describe the potential cost of a rule and identify the individuals most likely to bear those costs. This provision is intended to require an agency to identify in-

dividuals within the private sector who are most likely to be burdened by the potential costs of a rulemaking.

Subparagraph (i)(4)(D) requires an agency to make public an analysis of alternative approaches, other than one chosen by the agency, which the agency considered but discarded in its determination of how best to implement a law. Subparagraph (D) specifically requires an analysis of market-based mechanisms that could have achieved the same regulatory goal, and explanations as to why such market-based mechanisms were not adopted for the rulemaking. This provision requires that an agency not only explain any alternative approaches that were considered and not adopted, but to demonstrate that the rule provides for the least costly approach. To some extent, an agency's determination of the least costly approach must be based on estimations; however, subparagraph (i)(4)(D) is intended to require an agency to make as realistic a cost analysis of its potential alternatives as information available at the time of the analysis allows.

Subparagraph (i)(4)(E) places some burden on agencies to research current regulations in order to determine that a pending rule does not conflict with any other regulation issued by that agency or issued by other agencies. Subparagraph (E) further requires an agency to explain why such a conflict between two regulations should exist if it is contemplated that such a conflict is unavoidable.

Subparagraph (i)(4)(F) merely requires an agency to state whether, based on the information available at the time the rule is published, the rule will require on-site inspections or whether individuals affected by the rule will be required to maintain records which will be subject to inspection. If an agency rulemaking contemplates on-site inspections or inspections of records, required by the rule, then it is expected that the agency should have some idea of where the on-site inspections will be required, and who will be required to maintain records to be made subject to inspection. Subparagraph (i)(4)(F) requires the agency to, based on information available to it, publish that information.

Subparagraph (i)(4)(G) requires agencies to estimate the cost to the agency for implementing and enforcing a rule. Furthermore, subparagraph (G) requires an agency to, based on information available to it, to determine whether it can implement a rule with its current level of appropriations.

The regulatory impact analysis requirements of subsection (i)(4) are intended to mandate that agencies perform comprehensive analysis regarding many aspects of a proposed rule. These criteria are intended to lighten the burden of regulations on private citizens by requiring agencies to implement laws through the method which is least costly on individuals and businesses engaged in commerce in the United States. While in some respects the language of the impact criteria appears to place an undue burden on agencies, it is intended that the burden be placed upon agencies to avoid unnecessarily costly regulations rather than on citizens in complying with such regulations.

Subsection (i) provides authority to the director of the OMB to enforce agency compliance with the new impact analysis requirements. Specifically, this provision authorizes the OMB director to

review any preliminary or final impact analysis, notice of proposed rulemaking or final rule in order to determine whether the impact analysis requirements have been satisfied. Pursuant to subsection (i), an agency may not adopt a final regulatory impact analysis until the director has either approved it or commented upon it in writing.

An agency may not publish a final impact analysis or final rule that is commented upon in writing by the director until those comments have been responded to by the agency and incorporated in the agency rulemaking file. This provision is intended to provide significant enforcement authority to the OMB director to require agency compliance with the impact analysis criteria set forth in new subsection (i). The OMB director is empowered to either approve an agency's impact analysis statement or compel an agency to conform its final impact analysis and/or final rule to the mandates of the analysis requirements.

The Committee adopted an amendment by voice vote to create a 90-day deadline by which the OMB director must either approve or comment upon a final regulatory impact analysis or final rule. Pursuant to the amendment, new subsection (i) provides that an agency may publish a final impact analysis or final rule in the event that the director fails to either approve or respond in writing to such analysis or rule within 90-days after the date of request for review by the director. This language is intended to prevent the OMB director from vetoing a rule or impact analysis by simply failing to respond back to the agency once the director has initiated a review. The amendment was offered in response to testimony elicited at the Subcommittee hearing on February 6, 1995, wherein concerns were expressed that granting review authority to the OMB director without a time limitation could allow OMB to completely frustrate the agency rulemaking process.

Finally, the Committee adopted an amendment to subsection (i) to preclude OMB oversight of impact analysis requirements for certain monetary agencies. Section 204 now provides that with regard to major rulemakings by the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, or the Office of Housing Enterprise Oversight, that the term "director", will mean the head of such agency. This provision is intended to require impact analysis to be completed by these agencies, but in order to avoid potential political conflicts of interest, it specifically exempts them from OMB review.

Section 205—Standard of clarity

Section 205 amends section 553 of title 5 of the U.S. Code by creating new subsection (j). Section 205 represents a substantial rewrite of a more extensive provision included in title VII of H.R. 9. The language of section 205 is intended to merely encourage the head of an agency to ensure that regulatory impact analysis, and rules published by the agency are written in a simple and understandable manner that provides adequate notice to those affected by the rule. This provision does not provide authority to the director of OMB to enforce its requirements; and is intended to merely encourage agency compliance. This provision is not intended to cre-

ate justiciable questions regarding improper grammar or sentence structure or to interfere with court interpretations of adequate notice.

Section 206—Exemptions

Section 206 amends section 553 of title 5 of the U.S. Code to create a new subsection (k). Section 206 specifically exempts from the impact analysis requirements of this legislation, any regulation that responds to an emergency situation and any regulation for which consideration under these procedures would conflict with deadlines imposed by statute or by judicial order. This provision is intended to preclude impact analysis requirements from delaying the issuance of a regulation regarding an emergency situation. Furthermore, this provision is intended to allow agencies to forego compliance with impact analysis requirements where it is evident that to complete such analysis would make it impossible for the agency to meet a statutorily or judicially imposed deadline. The language of section 206 requires that regardless of the exemption regarding statutorily or judicially imposed deadlines, an agency must report to the OMB director why such conflict exists; and attempt to comply with the analysis requirements of this legislation to the extent permitted by the relevant statutory or judicial deadline.

The Committee adopted an amendment by voice vote which exempts one other class of regulations pursuant to section 206. Consequently, section 206 completely exempts from the impact analysis process, any regulations concerned with the implementation of monetary policy or to ensure the safety and soundness of federally insured depository institutions. This provision is intended to exempt such regulations that are issued by the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration or the Office of Federal Housing Enterprise Oversight.

Finally, new subsection (k) provides authority to the director of OMB to exempt from the impact analysis requirements, any class or category of regulations. This provision is intended to allow discretion to the director of OMB to exempt from its review authority those rulemakings which it lacks the requisite expertise to competently review.

Section 207—Report

Section 207 requires the director of OMB to submit a report to the Congress within 24 months of the date of enactment of this legislation containing an analysis of rulemaking procedures of Federal agencies. The report mandated by this section requires the OMB director to review the impact of federal rulemaking procedures on the regulated public and the regulatory process. This provision is intended to require the OMB director to analyze potential improvements in the rulemaking process which have resulted as a consequence of the enactment of this legislation.

TITLE III—PROTECTIONS

Section 301—Presidential action

This section of the bill directs the President to prescribe regulations for government employees in order to insure that Federal laws and regulations are administered consistent with the principle that any person shall, in connection with their enforcement, be protected from abuse, reprisal, or retaliation, and be treated fairly, equitably, and with due regard for such persons' Constitutional rights. The President is given 180 days from the date of enactment to take such action. Authority to prescribe regulations for the conduct of employees in the executive branch is vested in the President under 5 U.S.C. 7301.

AGENCY VIEWS

The Administration was represented during hearings on the material reflected in title I by John Spotila, General Counsel of the Small Business Administration. Sally Katzen, Administrator of the Office of Information and Regulatory Affairs (OIRA), testified on behalf of the Administration with respect to the material reflected in title II, and Deputy Attorney General Jamie Gorelick testified with respect to the material reflected in title III. In addition, letters were received from: Ricki Tigert Helfer, Chairman of the Federal Deposit Insurance Corporation; Derek J. Vander Schaaf, Deputy Inspector General of the Department of Defense; Steven Herman, Assistant Administrator of the Environmental Protection Agency; and Donna Shalala, Secretary of Health and Human Services, all with respect to title VIII of H.R. 9. The Committee made substantive changes to title VIII of that bill in response to these letters, the testimony of witnesses, and consultation with Members, which are reflected in title III of H.R. 926.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

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PART I—THE AGENCIES GENERALLY

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

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§ 551. Definitions

For the purpose of this subchapter—

(1) * * *

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(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; [and]

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter[.]; *(15) "major rule" means any rule subject to section 553(c) that is likely to result in—*

(A) an annual effect on the economy of $50,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets; and

(16) "Director" means the Director of the Office of Management and Budget.

* * * * * * *

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

* * * * * * *

(c)*(1)* After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(2) Each agency shall publish in the Federal Register, with each rule published under section 552(a)(1)(D), responses to the substance of the comments received by the agency regarding the rule.

* * * * * * *

(f)(1) Each agency shall for a proposed major rule publish in the Federal Register, at least 90 days before the date of publication of the general notice required under subsection (b), a notice of intent to engage in rulemaking.

(2) A notice under paragraph (1) for a proposed major rule shall include, to the extent possible, the information required to be in-

cluded in a regulatory impact analysis for the rule under subsection (i)(4)(B) and (D).

(3) For a major rule proposed by an agency, the head of the agency shall include in a general notice under subsection (b), a preliminary regulatory impact analysis for the rule prepared in accordance with subsection (i).

(4) For a final major rule, the agency shall include with the statement of basis and purpose—

(A) a final regulatory impact analysis of the rule in accordance with subsection (i); and

(B) a clear delineation of all changes in the information included in the final regulatory impact analysis under subsection (i) from any such information that was included in the notice for the rule under subsection (b).

(g) If more than 100 interested persons acting individually submit requests for a hearing to an agency regarding any rule proposed by the agency, the agency shall hold such a hearing on the proposed rule.

(h) If during the 90-day period beginning on the date of publication of a notice under subsection (f) for a proposed major rule, or if during the period beginning on the date of publication or service of notice required by subsection (b) for a proposed rule, more than 100 persons individually contact the agency to request an extension of the period for making submissions under subsection (c) pursuant to the notice, the agency—

(1) shall provide an additional 30-day period for making those submissions; and

(2) may not adopt the rule until after the additional period.

(i)(1) Each agency shall, in connection with every major rule, prepare, and, to the extent permitted by law, consider, a regulatory impact analysis. Such analysis may be combined with any regulatory flexibility analysis performed under sections 603 and 604.

(2) Each agency shall initially determine whether a rule it intends to propose or issue is a major rule. The Director shall have authority to order a rule to be treated as a major rule and to require any set of related rules to be considered together as a major rule.

(3) Except as provided in subsection (j), agencies shall prepare—

(A) a preliminary regulatory impact analysis, which shall be transmitted, along with a notice of proposed rulemaking, to the Director at least 60 days prior to the publication of notice of proposed rulemaking, and

(B) a final regulatory impact analysis, which shall be transmitted along with the final rule at least 30 days prior to the publication of a major rule.

(4) Each preliminary and final regulatory impact analysis shall contain the following information:

(A) A description of the potential benefits of the rule, including any beneficial effects that cannot be quantified in monetary terms and the identification of those likely to receive the benefits.

(B) An explanation of the necessity, legal authority, and reasonableness of the rule and a description of the condition that the rule is to address.

(C) A description of the potential costs of the rule, including any adverse effects that cannot be quantified in monetary terms, and the identification of those likely to bear the costs.

(D) An analysis of alternative approaches, including market based mechanisms, that could substantially achieve the same regulatory goal at a lower cost and an explanation of the reasons why such alternative approaches were not adopted, together with a demonstration that the rule provides for the least costly approach.

(E) A statement that the rule does not conflict with, or duplicate, any other rule or a statement of the reasons why such a conflict or duplication exists.

(F) A statement of whether the rule will require on-site inspections or whether persons will be required by the rule to maintain any records which will be subject to inspection.

(G) An estimate of the costs to the agency for implementation and enforcement of the rule and of whether the agency can be reasonably expected to implement the rule with the current level of appropriations.

(5)(A) the Director is authorized to review and prepare comments on any preliminary or final regulatory impact analysis, notice of proposed rulemaking, or final rule based on the requirements of this subsection.

(B) Upon the request of the Director, an agency shall consult with the Director concerning the review of a preliminary impact analysis or notice of proposed rulemaking and shall refrain from publishing its preliminary regulatory impact analysis or notice of proposed rulemaking until such review is concluded. The Director's review may not take longer than 90 days after the date of the request of the Director.

(6)(A) An agency may not adopt a major rule unless the final regulatory impact analysis for the rule is approved or commented upon in writing by the Director or by an individual designated by the Director for that purpose.

(B) Upon receiving notice that the Director intends to comment in writing with respect to any final regulatory impact analysis or final rule, the agency shall refrain from publishing its final regulatory impact analysis or final rule until the agency has responded to the Director's comments and incorporated those comments in the agency's response in the rulemaking file. If the Director fails to make such comments in writing with respect to any final regulatory impact analysis or final rule within 90 days of the date the Director gives such notice, the agency may publish such final regulatory impact analysis or final rule.

(7) Notwithstanding section 551(16), for purposes of this subsection with regard to any rule proposed or issued by an appropriate Federal banking agency (as that term is defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)), the National Credit Union Administration, or the Office of Federal Housing Enterprise Oversight, the term "Director" means the head of such agency, Administration, or Office.

(j) To the extent practicable, the head of an agency shall seek to ensure that any proposed major rule or regulatory impact analysis of such a rule is written in a reasonably simple and understandable

manner and provides adequate notice of the content of the rule to affected persons.

(k)(1) The provisions of this section regarding major rules shall not apply to—

(A) any regulation that responds to an emergency situation if such regulation is reported to the Director as soon as is practicable;

(B) any regulation for which consideration under the procedures of this section would conflict with deadlines imposed by statute or by judicial order; and

(C) any regulation proposed or issued in connection with the implementation of monetary policy or to ensure the safety and soundness of federally insured depository institutions, any affiliate of such institution, credit unions, or government sponsored housing enterprises regulated by the Office of Federal Housing Enterprise Oversight.

A regulation described in subparagraph (B) shall be reported to the Director with a brief explanation of the conflict and the agency, in consultation with the Director, shall, to the extent permitted by statutory or judicial deadlines, adhere to the process of this section.

(2) The Director may in accordance with the purposes of this section exempt any class or category of regulations from any or all requirements of this section.

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CHAPTER 6—THE ANALYSIS OF REGULATORY FUNCTIONS

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§ 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration *in accordance with section 612(d).*

* * * * * * *

[§ 611. Judicial review

[(a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.

[(b) Any regulatory flexibility analysis prepared under sections 603 and 604 of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall

constitute part of the whole record of agency action in connection with the review.

[(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.]

§ 611. Judicial review

(a)(1) Except as provided in paragraph (2), not later than 180 days after the effective date of a final rule with respect to which an agency—

(A) certified, pursuant to section 605(b), that such rule would not have a significant economic impact on a substantial number of small entities; or

(B) prepared a final regulatory flexibility analysis pursuant to section 604,

an affected small entity may petition for the judicial review of such certification or analysis in accordance with the terms of this subsection. A court having jurisdiction to review such rule for compliance with the provisions of section 553 or under any other provision of law shall have jurisdiction to review such certification or analysis.

(2)(A) Except as provided in subparagraph (B), in the case where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 180 day period provided in paragraph (1), such lesser period shall apply to a petition for the judicial review under this subsection.

(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section 608(b), a petition for judicial review under this subsection shall be filed not later than—

(i) 180 days; or

(ii) in the case where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 180-day period provided in paragraph (1), the number of days specified in such provision of law,

after the date the analysis is made available to the public.

(3) For purposes of this subsection, the term "affected small entity" means a small entity that is or will be adversely affected by the final rule.

(4) Nothing in this subsection shall be construed to affect the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law.

(5)(A) In the case where the agency certified that such rule would not have a significant economic impact on a substantial number of small entities, the court may order the agency to prepare a final regulatory flexibility analysis pursuant to section 604 if the court determines, on the basis of the rulemaking record, that the certification was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(B) In the case where the agency prepared a final regulatory flexibility analysis, the court may order the agency to take corrective action consistent with the requirements of section 604 if the court determines, on the basis of the rulemaking record, that the final regu-

latory flexibility analysis was prepared by the agency without observance of procedure required by section 604.

(6) If, by the end of the 90-day period beginning on the date of the order of the court pursuant to paragraph (5) (or such longer period as the court may provide), the agency fails, as appropriate—

(A) to prepare the analysis required by section 604; or

(B) to take corrective action consistent with the requirements of section 604,

the court may stay the rule or grant such other relief as it deems appropriate.

(7) In making any determination or granting any relief authorized by this subsection, the court shall take due account of the rule of prejudicial error.

(b) In an action for the judicial review of a rule, any regulatory flexibility analysis for such rule (including an analysis prepared or corrected pursuant to subsection (a)(5)) shall constitute part of the whole record of agency action in connection with such review.

(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.

§ 612. Reports and intervention rights

(a) * * *

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(d) ACTION BY THE SBA CHIEF COUNSEL FOR ADVOCACY.—

(1) TRANSMITTAL OF PROPOSED RULES AND INITIAL REGULATORY FLEXIBILITY ANALYSIS TO SBA CHIEF COUNSEL FOR ADVOCACY.—On or before the 30th day preceding the date of publication by an agency of general notice of proposed rulemaking for a rule, the agency shall transmit to the Chief Counsel for Advocacy of the Small Business Administration—

(A) a copy of the proposed rule; and

(B)(i) a copy of the initial regulatory flexibility analysis for the rule if required under section 603; or

(ii) a determination by the agency that an initial regulatory flexibility analysis is not required for the proposed rule under section 603 and an explanation for the determination.

(2) STATEMENT OF EFFECT.—On or before the 15th day following receipt of a proposed rule and initial regulatory flexibility analysis from an agency under paragraph (1), the Chief Counsel for Advocacy may transmit to the agency a written statement of the effect of the proposed rule on small entities.

(3) RESPONSE.—If the Chief Counsel for Advocacy transmits to an agency a statement of effect on a proposed rule in accordance with paragraph (2), the agency shall publish the statement, together with the response of the agency to the statement, in the Federal Register at the time of publication of general notice of proposed rulemaking for the rule.

(4) SPECIAL RULE.—Any proposed rules issued by an appropriate Federal banking agency (as that term is defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C.

1813(q)), the National Credit Union Administration, or the Office of Federal Housing Enterprise Oversight, in connection with the implementation of monetary policy or to ensure the safety and soundness of federally insured depository institutions, any affiliate of such an institution, credit unions, or government sponsored housing enterprises or to protect the Federal deposit insurance funds shall not be subject to the requirements of this subsection.

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MINORITY VIEWS

We agree that steps need to be taken to make the regulatory process more sensitive to the needs of small businesses. Small businesses lack the staff and resources to follow regulatory developments, are less likely to have their interests represented by trade associations and lobbyists, and may bear a disproportionate cost of complying with federal regulations. We support the concept of bringing greater accountability to the Federal agencies that deal with small businesses and taxpayers. Nonetheless, we continue to have significant concerns about Title II of the bill.

The rulemaking process has been criticized as being overly prescriptive, expensive, and laden with burdensome and useless paperwork. Title II exacerbates these problems by creating a costly, time-consuming, and maze-like process that does nothing to streamline government or roll back red tape. In fact, Title II fails its own test: it is not the most cost-effective approach to regulatory reform.

The most obvious problem with Title II is that it defines a "major rule"—the trigger for time-consuming procedural steps and costly analysis—as any rule with an annual effect on the economy of $50 million. For 20 years, beginning with the Administration of former President Gerald Ford, the Executive Branch has used $100 million as the benchmark for defining a "major rule," a standard that in today's dollars would be $300 to $400 million. Presidents Reagan and Bush, in fact every President since Ford regardless of party affiliation, set the threshold at $100 million. The vast majority of the witnesses, including C. Boyden Gray—President Bush's White House Counsel and current Chairman of Citizens for a Sound Economy—recommended that the $100 million threshold be retained.

Another problem with the definition of "major rule" is the inclusion of two other triggers drawn from Reagan Executive Order 12,291. It is one thing to use expansive language in a flexible executive order; but it is another to use the same language in a statute that is subject to judicial review. For example, what is a "significant effect on competitiveness"? Does that include a regulation that makes small business more competitive with big business? How do you quantify an effect on innovation? These questions could lead to endless litigation. The Committee rightly eliminated consideration of indirect effects from Title I of the bill, but we are concerned that we are introducing the same concept here.

OMB has the authority under the bill to call any rule a "major rule," so truly far-reaching regulations will not escape notice. However, the resources devoted to regulatory analysis should be commensurate with the significance of the decision to be made. The EPA estimates it will cost taxpayers up to $1.6 million for each Regulatory Impact Analysis and risk assessment. Do we really

want to impose that kind of cost on the Federal Emergency Management Agency before it makes changes to grants for disaster victims or technical changes to flood maps? Or the Food and Drug Administration before it approves the use of a new sweetener in food? Or the Department of the Interior before it opens migratory bird hunting season? At a time when we are burdened with enormous deficits, we should prioritize more wisely.

Another issue is the extended timeline for regulations. Title II could add two years to the length of time it takes to issue a regulation. The public expects government to act in a timely and appropriate fashion to protect health, safety, and the environment. Likewise, industry does not benefit from interminable delay—businesses will be unable to get timely answers on how laws are to be implemented. The timeline can and should be condensed, and reconsidered altogether for situations where there is a substantial threat to public health or safety.

H.R. 926 is a significant improvement over the 23-step analysis that would have been required by H.R. 9. But we still have some concerns with several of the remaining steps and would like to continue working with the Committee to establish practical criteria that ensure that agencies will choose the approach that provides the most for the resources spent. The bill's "least costly" language does not accomplish this and in fact could force an agency to ignore the most cost-effective approach. The bill could also cause expensive, never ending rulemaking proceedings by forcing an agency to analyze an unreasonable number of hypothetical alternatives to the rule. We understand that is not the intent of the drafters, and hope to work with the Chairman to clarify this section prior to floor consideration.

The Regulatory Impact Analysis, as part of the rulemaking record, is reviewable when the regulation itself is challenged. This is the appropriate time for review. To allow for separate review of the Regulatory Impact Analysis itself is litigation overkill.

Both the Chairman and the Ranking Member were concerned that simply by dragging its heels, OMB could hold up urgent rules indefinitely. The Committee voted to eliminate the possibility of a pocket veto by OMB. We understand technical changes are necessary to give full effect to the Committee's decision and that the majority is willing to make the necessary changes.

However, we continue to be concerned about the possibility of perverting the requirements of openness and accountability in the regulatory process by allowing ex parte and third party contacts to be off the record at critical stages of the regulation writing process. Congressional investigations over the years have repeatedly documented the profound impact that such secret contacts can have on important regulations affecting the public health and welfare. We believe that consistent with the spirit of the Administrative Procedure Act, records should be kept when government officials involved in writing regulations meet with private parties attempting to influence the outcome of those regulations. Justice Brandeis once said that the best antiseptic for government misdeeds was sunshine. Unfortunately, an amendment to put such "sunshine" requirements in statute was defeated.

Finally, we commend the Committee for adopting amendments to preserve the necessary independence of the bank regulatory agencies, especially as it affects their responsibilities concerning the safety and soundness of the U.S. banking system and the conduct of monetary policy. Banking regulators must be able to exercise independent and expeditious judgement to safeguard system stability and protect the Federal deposit insurance funds. In order to fulfill these obligations, the regulators must be as free as possible from political influence and unnecessary bureaucratic layers that could distort or delay implementation of regulations directly affecting the nation's financial and economic stability. We are pleased that the Committee recognized that the procedures outlined in H.R. 926 are not appropriate for every type of regulation.

Carefully crafted regulations protect consumers from dangerous products, control immigration, establish traffic lanes for airplanes, quarantine areas to prevent the spread of pests such as the medfly, and help combat drug trafficking by setting standards for tracing money laundering, among other things. Government must be able to take these important actions efficiently without wasting taxpayer's money. While the Committee has made substantial improvements to the bill, many Members of the minority continue to believe that it will unnecessarily slow and add needless expense to the regulatory process. We hope the majority will continue to work with us to resole these problems so that we can enact legislation that provides remedies for the shortcomings of the regulatory process without undermining its strengths.

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XAVIER BECERRA.
ROBERT SCOTT.
JOSÉ E. SERRANO.
JERROLD NADLER.
SCHEILA JACKSON-LEE.
MELVIN L. WATT.
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